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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

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Implementation of the
Telecommunications Act of 1996

CC Docket No. 96-152

Telemessaging,
Electronic Publishing, and
Alarm Monitoring Services

BELLSOUTH REPLY TO FURTHER COMMENTS

BellSouth Corporation, for itself and on behalf of its affiliated companies ("BellSouth"), hereby responds to comments submitted pursuant to the Commission's *Further Notice of Proposed Rulemaking*¹ in the above captioned proceeding.

In the *Report and Order*, the Commission concluded that "a BOC must control, or have a financial interest in, the content of the information transmitted over its basic telephone service in order to be [engaged in electronic publishing and] subject to the requirements of section 274."² In the *Further Notice*, the Commission solicited comment on the appropriate meaning of the terms "control" and "financial interest" for purposes of the foregoing conclusion.

Parties nearly universally agreed that these terms should not be defined in a way that would cause activities permitted as part of the operation of a gateway to be deemed "control" of,

¹ *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-35 (rel. Feb. 7, 1997) (cited herein as "*Report and Order*" or "*Further Notice*," as appropriate).

² *Report and Order* at ¶ 49.

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or a “financial interest” in, the information accessible through the gateway. Only AT&T advocated meanings that would undermine BOCs’ abilities to offer gateway and related functions expressly permitted by Section 274(h)(2)(C).³ AT&T’s suggestions conflict with the Act and must be rejected.

Meaning of “Control”

In its Comments, BellSouth urged the Commission to base its interpretation of “control” on the “exercise of editorial discretion . . . by the actual publisher of that information, rather than the mere facilitation of a user’s access to a desired provider of information.”⁴ Other parties offered similar views.

For example, Bell Atlantic and NYNEX contend that “control” is best viewed in terms of the “ultimate right to make decisions . . . regarding what content is to be created and how it is to be managed and presented.”⁵ Similarly, SBC asserts that “the ability to control the authorship or to edit the content of information” is the only appropriate measure of “control.”⁶ US West observes that the Commission should define “control” in the context of “attributes of publishing.”⁷ Ameritech suggests that “control” rests with “the owner of the intellectual property in that information.”⁸

³ 47 U.S.C. § 274(h)(2)(C).

⁴ BellSouth Comments at 3.

⁵ Bell Atlantic and NYNEX Comments at 2.

⁶ SBC Comments at 6.

⁷ US West Comments at 1.

⁸ Ameritech Comments at 2.

Moreover, all of these parties agree that “control” should not be defined in a way that would cause activities permitted as part of the operation of a gateway under Section 274(h)(2)(C) to be deemed “control” of the information content accessible through the gateway.⁹ In particular, these parties agree that “control” of content does not exist merely by virtue of a gateway provider’s offering of an ability to “limit the types of information to which its gateway connects,”¹⁰ because such an ability does not affect the content of the underlying information.¹¹

Only AT&T argues otherwise, but even then hedges its own opposition. AT&T first erroneously characterizes the Commission’s inquiry as to “*whether* ‘control’ should be broadly interpreted to include the ability of a BOC, when acting as a gateway provider, to limit the types of information to which its gateway connects”¹² as a *proposal* that “control” should be so defined.¹³ The *Further Notice* is clear that no such proposal has been made that AT&T can “endorse.”¹⁴

Moreover, notwithstanding the negative connotation AT&T attaches to its speculation that a BOC operating as a gateway to the internet World Wide Web could impose filters to limit customers’ abilities to reach certain information sources, AT&T properly concedes that such mechanisms do not constitute “control” of information content when utilized to limit access to

⁹ BellSouth Comments at 2-3; Ameritech Comments at 2 (alternative interpretation would “make the gateway exception in Section 274(h)(2)(C) a ‘nullity’”); SBC Comments at 7; Bell Atlantic and NYNEX Comments at 3; US West Comments at 7-8.

¹⁰ *Further Notice* at ¶ 244.

¹¹ BellSouth Comments at 3; Ameritech Comments at 2; SBC Comments at 7; Bell Atlantic and NYNEX Comments at 3; US West Comments at 7-8.

¹² *Further Notice* at ¶ 244 (emphasis added).

¹³ AT&T Comments at 3.

¹⁴ *Id.*

websites that contain unlawful or socially unacceptable information.¹⁵ Although AT&T would have this exception apply only to access limitations “carefully tailored” to sources of “information, the transmission or possession of which *could be* a violation of laws *such as* those prohibiting child pornography or hate crimes,”¹⁶ the irony of AT&T’s attempt to make such distinctions is that the distinctions themselves turn on the content of the underlying information -- over which the BOC has no control. Under AT&T’s logic, a BOC would be not be deemed to have control over content if its web filter blocked access to a website that contained illicit information but would be deemed to have control if the website proprietor removed the offensive content from that site. Any such interpretation of BOC “control” that turns on factors beyond the realm of a BOC’s actual control would make no sense.

Nor is AT&T’s proposal commercially realistic. As a gateway provider, a BOC may desire to distinguish its gateway through offering customers limitations on users’ abilities to access information sources in addition to those that may be offensive or illegal. For example, current news reports indicate that such features may have appeal particularly to business customers who want to limit employees’ opportunities to surf the net for personal reasons on company time.¹⁷ A BOC offering these types of limitations as part of its gateway offering in no way affects or controls the content of information others choose to make available through web

¹⁵ *Id.* at note 4.

¹⁶ *Id.* (emphasis added).

¹⁷ *See, e.g.,* Alex Markels, *Dirty Work: Web Screeners Block Smut*, Wall Street Journal, Apr. 23, 1997, at B1 (“Microsystems, which makes the popular Cyber-Patrol child-protection software used by America Online and CompuServe, recently introduced a corporate version that allows managers to bar employee access to anything that might be construed as a time-waster: on-line sex sites, newspapers, and news wires -- as well as Web pages dedicated to travel, personal finance, sports and entertainment.”)

connections. Instead, such functional limitations are part of the “navigational system” that BOCs are permitted to offer as part of a gateway pursuant to Section 274(h)(2)(C). Accordingly, AT&T’s attempt to treat such functionalities as “control” of content should be rejected.

Meaning of “Financial Interest”

As above, the parties other than AT&T agree that “financial interest” in content of information must not be defined in a way that would undermine BOCs’ statutory authorization to offer gateways and associated navigational aids. Indeed, most seemed to recognize that “financial interest” in content is an amorphous concept and that the more appropriate measure is one of financial interest in the entity providing the content,¹⁸ in the success of the service offered by that entity,¹⁹ or the intellectual property rights associated with the information content.²⁰ These parties also agree that receipt of compensation by a BOC from an information content provider for the BOC’s role as provider of the gateway does not create a “financial interest” in the content of the information.²¹

Only AT&T argues otherwise, asserting that while Section 274(h)(2)(C) clearly permits BOCs to provide navigational aids and hypertext links as part of a gateway, the BOC is precluded from being compensated for that service. Nothing in Section 272(h)(2)(C), however, limits the

¹⁸ See, e.g., Bell Atlantic and NYNEX Comments at 4 (“at least 10 percent of the gross revenues of the entity that publishes the content”); Ameritech Comments at 3 (“indirect equity interest” defined by ownership of more than 10% of the entity that owns the information); US West Comments at 9 (“focus should be on whether the entity or enterprise in which the BOC has a financial interest . . .”).

¹⁹ See, e.g., BellSouth Comments at 5.

²⁰ See, e.g., SBC Comments at 7-8.

²¹ US West Comments at 9; Ameritech Comments at 3-4; SBC Comments at 7-8; BellSouth Comments at 6.

authority granted therein for BOCs to provide hypertext links and other navigational aids by requiring that such functions be performed at no charge. AT&T simply seeks to handicap BOC internet access services that compete with its own offering. The Commission cannot limit the authority granted by Congress by imposing conditions or qualifications that are not supported by the statute.

BOCs offering gateway services provide value both to end users and to information content providers by structuring navigational systems to make such information content easily accessible. Remuneration to BOCs for these services compensates them for the value of their contribution and is unrelated to the content of the information users ultimately select.

Accordingly, such arrangements cannot be defined to be a “financial interest” in the content of information. AT&T’s absurd and patently anticompetitive assertions to the contrary must be rejected.

CONCLUSION

BellSouth urges the Commission to define “control” and “financial interest” in accordance with the discussion above and in BellSouth’s Comments. Applying such definitions will lead to

results consistent with the statutory exclusion of gateway services from the definition of electronic publishing.

Respectfully submitted,

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DATE: April 25, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of April, 1997 served the following parties to this action with a copy of the foregoing **BELLSOUTH REPLY TO FURTHER COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.



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